No. 47236-8-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

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**STATE OF WASHINGTON**,

Appellant,

vs.

**ANGEL ROSE MARIE NELSON,**

Respondent.

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Appeal from the Superior Court of Washington for Lewis County
Case No. 14-1-00594-1

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# Appellant's Reply Brief

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JONATHAN L. MEYER
Lewis County Prosecuting Attorney

By: _____
SARA I. BEIGH, WSBA No. 35564
Senior Deputy Prosecuting Attorney

Lewis County Prosecutor's Office
345 W. Main Street, 2nd Floor
Chehalis, WA 98532-1900
(360) 740-1240

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# I. ARGUMENT

## A. THE STATE PRESENTED PRIMA FACIE EVIDENCE THAT THE GIFT CARD WAS AN ACCESS DEVICE.

The State's opening brief was concise and to the point. The State, in its reply brief, will attempt to reply to some of Nelson's arguments raised in her response. Otherwise the State rests on its argument set forth in its Opening Brief.

### 1. Other Means Of Account Access Necessarily Is Part Of The List Of Types Of Access Devices.

Nelson argues that one of the elements of access device, as defined within the statute, requires all the listed items to be a means of account access. Brief of Appellant 7. Nelson states, "[t]he word 'other' in the phrase 'other means of account access' logically requires that both the enumerated items and the catch-all phrase share the characteristic of being a 'means of account access.'" Brief of Appellant 7. Nelson's argument incorrectly applies the ejusdem generis rule and is incorrect.

The statue defines access device as:

> Any card, plate, code, account number, or other means of account access that can be used alone or in conjunction with another access device to obtain money, goods, services, or anything else of value, or that can be used to initiate a transfer originated solely by paper instrument[.]

RCW 9A.56.010(1). The ejusdem generis rule applies when giving meaning to general terms in a statute.

> The ejusdem generis rule requires that general terms appearing in a statute in connection with specific terms are to be given meaning and effect only to the extent that the general terms suggest items similar to those designated by the specific terms. In short, specific terms modify or restrict the application of general terms where both are used in sequence.

*City of Seattle v. State, Dep't of Labor & Indus.*, 136 Wn.2d 693, 699, 965 P.2d 619 (1998). Therefore, the phrase "other means of account access" is restricted to those means that are similar to cards, plates, codes, or account numbers.

For example, while a person could use a telephone in conjunction with an access device to obtain goods or services, a telephone would not be an "other means of account access" as applied here. Further, under Nelson's interpretation, the listing of the specific items in the statute would be superfluous.

This Court should follow the ejusdem generis rule and reject Nelson's reading of the statute. "Other means of account access" is a general term, a catch-all; that allows other like items to be considered access devices, such as a gift card.

### 2. The Statute Does Not Require An Access Device Be Linked To A Person's Credit Or Checking Account.

Nelson argues that account, as referenced in RCW 9A.56.010(1), has a narrow and limited definition of banking related credit or debit accounts. Brief of Appellant 11-16. Yet the statute, RCW 9A.56.010(1), does not have such a narrow definition of account. Nelson argues this more limited definition of account is consistent with related statutes and cites to *State v. Morales* for the premise that when interpreting a statute the court will consider not only the statute but also "the entire sequence of all statutes relating to the same subject matter." Brief of Appellant 11, citing *State v. Morales* 173 Wn.2d 560, 567 269 P.3d 269 (2012). Nelson then goes outside of RCW Chapter 9A.56 and even outside RCW Title 9A, and looks to RCW 62A.4A-203(2) and RCW Title 19 to support her arguments regarding the definitions of access devices and account. Brief of Appellant 11-13.

"The entire sequence of all statutes relating to the same subject" would be the sequence of statutes that fall within RCW 9A.56, the theft statute. Nelson points to no case that indicates that a sequence of statutes relating to the same subject matter include

those statutes outside the chapter of the statute in question. See Brief of Appellant.

Contained within RCW 9A.56 the legislature references statutes outside of that chapter when it is necessary to use definitions from statutes outside chapter 9A.56. See RCW 9A.56.030 (citing RCW 9.41.010 to define firearm, RCW 9.91.175 to define a search and rescue dog, and RCW 19.290.010 to define commercial metal property, nonferrous metal property or private metal property); RCW 9A.56.096(7) (citing to RCW 63.19.010 to define lease-purchase agreements); RCW 9A.56.120(1) (citing RCW 9A.04.110(27)(a),(b), or (c) to define a threat); RCW 9A.56.130(1) (citing RCW 9A.04.110(25)(d) through (j) to define a wrongful threat); and RCW 9A.56.150(1), RCW 9A.56.300, RCW 9A.56.310 (citing RCW 9.41.010 to define a firearm). Most notable is RCW 9A.56.280 which define credit card, debit card, check and other financial and banking items. RCW 62A.3-104 is cited to under the definition of "check." RCW 9A.56.280(2). While, RCW 9.35.005 is cited to under the definition of "financial information" and "means of identification." RCW 9A.56.280(7) and (9).

If the legislature wanted to limit the definition of access device and gift card to the definitions found within the banking statues in

RCW Title 19 and RCW 62A.42.4A-203(2) it would have done so. There are definitional sections throughout RCW chapter 9A.56 that refer to other statutes. The legislature chose not to refer to another Title or chapter of the RCW for a definition of "access device" or "gift card" and therefore, Nelson's argument that this Court is to look outside chapter 9A.56 in regard to the legislative intent of what an "access device" or "gift card" is meant to be is misplaced.

### 3. A Gift Card Is Similar To A Credit Card With A Strict Credit Limit.

If someone steels an access device, there is no requirement that the access device have access to more than 750 dollars, for the theft to be considered Theft in the Second Degree. RCW 9A.56.040(1). It is simply Theft in the Second Degree if a person steels an access device, regardless of how much money that access device gives the person access to. RCW 9A.56.040(1)(d).

Nelson agrees that a credit card is an access device. Brief of Respondent 10-11. Credit cards can have strict credit limits, some under what would be the normal threshold amount for a theft to be considered a Theft in the Second Degree. A credit card with a strict limit is similar to a gift card. Under Nelson's analysis, a credit card with a strict credit limit of 300 dollars, while technically being an access device, would run afoul of the intent of the statute and given

the unfettered discretion prosecutors are granted make a felony out of a something that should truly be a misdemeanor theft.[1] This argument is absurd, because the statute is clear that there is no threshold amount of credit, money, goods, or services that is required to be linked to an access device for the theft to be considered a felony. RCW 9A.56.040(1)(d).

A gift card with any amount on it, whether it be 50 dollars 500 dollars is an access device just as a credit card with a strict limit of 300 dollars is an access device. The fact that they both give the thief access to an amount of money, goods or services that is less than 750 dollars is inconsequential, the legislature has still deemed the crime Theft in the Second Degree because the person has stolen an access device. If the legislature wishes to add an element regarding a threshold amount of goods, services, money or credit that account must be linked to, that is the legislature's prerogative, but at this time, there is no such requirement.

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[1] Nelson has not challenged the constitutionality of the statute. Further, if Nelson has a complaint regarding prosecutorial discretion that should be taken up with the legislature, as the prosecutor is granted that power statutorily.

## II. CONCLUSION

For the reasons argued in the State's Opening Brief and this Reply Brief this court should reverse the trial court's ruling dismissing this case and remand the case back to the trial court for the State to prosecute Nelson for Theft in the Second Degree.

RESPECTFULLY submitted this 29th day of October, 2015.

JONATHAN L. MEYER
Lewis County Prosecuting Attorney

by:_____
SARA I. BEIGH, WSBA 35564
Attorney for Plaintiff

**COURT OF APPEALS FOR THE STATE OF WASHINGTON**
**DIVISION II**

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| STATE OF WASHINGTON,<br>Respondent,<br>vs.<br>ANGEL ROSE MARIE NELSON,<br>Appellant. | No. 47236-8-II<br>DECLARATION OF SERVICE |

Ms. Teri Bryant, paralegal for Sara I. Beigh, Senior Deputy Prosecuting Attorney, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: On October 29, 2015, the appellant was served with a copy of the **Appellant's Reply Brief** by email via the COA electronic filing portal to John A. Hays, attorney for appellant, at the following email address: ltabbutlaw@gmail.com.

DATED this 29th day of October, 2015, at Chehalis, Washington.

Teri Bryant

Teri Bryant, Paralegal
Lewis County Prosecuting Attorney Office

# LEWIS COUNTY PROSECUTOR

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